92-1723

No. 93-_____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ORANGE COUNTY POLITICAL COALITION, JAMES JACKSON, WARDELL SIMS, JAMES Q. MITCHELL, and a certified class of all black citizens of Orange County, Florida, who are now, who will be, or who have been eligible to vote since 1980,

Petitioners,

v.

THE ORANGE COUNTY, FLORIDA, BOARD OF COUNTY COMMISSIONERS, and BETTY CARTER, supervisor of elections, Orange County, Fla.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit correctly affirm summary judgment entered against a certified class of black voters who were refused any evidentiary proceeding, even to demonstrate the invidious discrimination in violation of their constitutional rights which motivated an official effort to dilute their voting strength in the election of commissioners for Orange County, Fla?

2. Was an expert's affidavit, (1) based on county commission elections in which no black had appeared, and (2) on exogenous county judge and school board contests, constitutionally sufficient to avoid proceedings at which the certified class could prove that a totality of circumstances warranted findings of white racial bloc voting sufficient to satisfy a prequisite for seeking relief from alleged violations of § 2 of the federal Voting Rights Act in Orange County, Fla.?

3. Was meaningful access to the federal court system denied to a certified class of black citizens, including absentee members, who were deprived of any timely, meaningful conference or hearing, and any evidentiary proceeding, before they were forever barred from asserting any federal constitutional or statutory challenge to the present system for election of commissioners in Orange County, Fla.?

PARTIES

All parties in this matter are set forth in the caption. In the reported decisions below, the late Cornell Williams continued to be listed as the first named plaintiff-appellant, although the courts had been notified that he passed away during the January week in 1992 when a visiting trial judge first entered summary judgment for defendants in this action. An organization, the Committee of Organized Groups, which appeared at the trial level as a plaintiff, no longer exists. County commissioners named individually were dismissed as parties at pre-trial proceedings.

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No. 93 ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

ORANGE COUNTY POLITICAL COALITION, JAMES JACKSON, WARDELL SIMS, JAMES Q. MITCHELL, and a certified class of all black citizens of Orange County, Florida, who are now, who will be, or who have been eligible to vote since 1980,

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THE ORANGE COUNTY, FLORIDA, BOARD OF COUNTY COMMISSIONERS, and BETTY CARTER, supervisor of elections, Orange County, Fla.,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, ORANGE COUNTY POLITICAL COALITION, JAMES JACKSON, WARDELL SIMS,

JAMES Q. MITCHELL, and a certified class of all black citizens of Orange County, Fla., who are now, who will be, or who have been eligible to vote since 1980, respectively pray that a writ of certiorari issue to review the judgment and opinion of the U.S. Court of Appeals for the Eleventh Circuit entered in this proceeding on Dec. 28, 1992.

CITATIONS TO OPINIONS BELOW

The judgment and per curiam ruling of the U.S. Court of Appeals for the Eleventh Circuit affirming summary judgment entered for Defendants on both claims is reported at 979 F.2d 1504. They are reprinted here, starting at p. 1a.. From the trial court, a judgment of Feb. 3,1992, and an order to deny plaintiffs' motion to alter or amend judgment of Feb. 26, 1992, are unreported. They likewise are here at pp. 4a and 5a, respectively. The affirmed order granting Defendants' motion for summary judgment; denying Plaintiffs' Motion Under Federal Rule of Civil Procedure 56(f), and also

denying all other pending motions, is reported at 783 F. Supp. 1348 and 1362 (M.D. Fla. 1992). The order begins at p. 7a and concludes with two statistical appendices, starting at pp. 1b and 1c.

RELATED RULINGS

Also in the appendix are the following unreported rulings at the trial level: a visiting judge's (1) order denial, on Jan. 28, 1992, of plaintiffs' motion to set aside a magistrate's order denying a discovery conference, p. 1d; (2) order by the Hon. Patricia Fawsett to take defendants' motion for summary judgment under advisement, Dec. 4, 1991, p. 2d; (3) notice of pre-trial conference, Dec. 10, 1991, p. 4d; (4) order of U.S. magistrate of Oct. 3, 1991 denying a motion for discovery conference, and resolving other issues, pp. 7d/8d; (5) order by the magistrate for scheduling of discovery, motion filing, and pre-trial stipulation, July 2, 1991, p. 8d; (6) orders by Judge Fawsett certifying the plaintiff class, on Dec. 7, 1990,

p. 10d, and (7) for a hearing on the motion for class certification, on Nov. 28, 1990, p. 11d; (8) unreported opinion order by Judge Fawsett, of Friday, Aug. 31, 1990, denying plaintiffs' motion for preliminary injuntion, p. 12d; (9) unreported order by Judge Fawsett, of Aug. 15, 1990, denying plaintiffs' motions for reassignment of case to another judge, and/or reconsideration of recusal, and setting a hearing on preliminary relief for Aug. 31, 1990, p. 20d; (10) notice of judicial reassignment, July 30, 1990, p. 22d; (11) unreported order of July 27, 1990, by Judge Fawsett denying plaintiffs' motion for recusal as it pertained to her, p. 23d; and (12) endorsement by the Hon. G. Kendall Sharp of plaintiffs' motion for recusal of judges resident in Orlando, Florida, "including himself and Judge Fawsett," p. 24d; (13) pre-trial stipulation excerpt, filed Dec 5, 1991, p. 28d; (14) order by Justice Anthony Kennedy, to extend time for filing petition for certiorari until April 27, 1993, p. 1e.

JURISDICTION

The judgment of the Court of Appeals affirming the District Court's dismissal of the case was entered on December 28, 1992. On March 18, 1993, Justice Anthony Kennedy entered an order extending the time for filing a petition for writ of certiorari to and including April 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> § 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of the life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such State....

§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fifteenth Amendment to the United States Constitution provides:

> § 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
> § 2. The Congress shall have power to enforce this article by appropriate legislation.

§ 2(a) and (b) of the Voting Rights Act as amended, 42 U.S.C. §1973b is set forth in full in the published trial court opinion, Williams v. Orange County, 783 F. Supp. 1348, 1357-58 (M.D. Fla. 1992), and reproduced herein in the appendix.

42 U.S.C. § 1983, of the Civil Rights Act of 1871, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to

> be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution, and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding, for redress.

28 U.S.C. 144, **Bias or prejudice of judge**, provides:

> Whenever a party to any proceeding in district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice

> exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. 455a, **Disqualification of justice, judge, or magistrate**, provides in pertinent part:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned....
> (d) For the purposes of this section, the following words or phrases shall have the meaning indicated: (1) "proceeding" includes pretrial, trial, appellate review or other stages of litigation.

Rule 23, **Class Actions**, Federal Rules of Civil Procedure, provides in pertinent part:

(a) **Prerequisites to a Class Action.**
One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(d) **Orders in Conduct of Actions.**
In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribed measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to inter-

vene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise**.

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 26(f), **Discovery Conference**, Federal Rules of Civil Procedure, provides in pertinent part:

At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

> (1) A statement of the issues as they then appear; (2) A proposed plan and schedule of discovery; (3) Any limitations proposed to be placed on discovery; (4) Any other proposed orders with respect to discovery, and (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Rule 56, **Summary Judgment**, Federal Rules of Civil Procedure, provides in pertinent part:

> (b) **For Defending Party**. A party against whom a claim, counterclaim, or cross-claim

is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

....

(e) **Form of Affidavits, Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may

permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Rule 59, **New Trials; Amendment of Judgments**, Federal Rules of Civil Procedure, provides in pertinent part:

> (a) **Grounds**. A new trial may be granted to all or any of the parties and on all or part of the issues...(2) in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact, and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment.
> (b) **Time for Motion**. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.
> (c) **Time for Serving Affidavits**. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation....
> (e) **Motion to Alter or Amend a Judgment**. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 65, **Injunctions**, Federal Rules of Civil Procedure, provides in pertinent part:

> (a) **Preliminary Injunction**. (2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of a hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

Rule 3.06, **FINAL PRETRIAL PROCEDURES**, Local Rules, United States District Court, Middle District of Florida, provides in pertinent part:

(c) The pretrial stipulation shall be filled with the Court no later than three (3) days before the date of the final pretrial conference (or at such other time as the Court may direct) and shall contain...(9) a concise statement of those issues of fact which remain to be litigated (without incorporation by reference to prior pleadings and memoranda); (12) a list of all motions or other matter which require action by the Court; and (13) the signatures of counsel for all parties.

(e) All pleadings filed by any party prior to filing of the pretrial stipulation shall be deemed to be merged therein, or in any subsequent pretrial order entered by the Court. The pretrial stipulation and the pretrial order, if any, will control the course of the trial and may not be amended except by order of the Court in the furtherance of justice. If new evidence or witnesses are discovered after filing of the pretrial stipulation, the party desiring to use the same shall immediately notify opposing counsel and the Court, and such use shall be permitted only by order of the Court in furtherance of justice.

STATEMENT OF THE CASE

Petitioners filed this voting rights action on July 23, 1990, about a week after nominations were closed for candidates seeking one of six single-member district seats or the chair elected at large for the Orange County, Fla., Commission. For 18 months thereafter, from the filing of a motion for preliminary injunction with the verified complaint, to halt the first use of that 6-1 system in a Sept. 4, 1990, election, through a timely motion to alter or amend the summary judgment in Feb[illegible] 1992, Petitioners filled the court file with public documents and news reports. They were submitted to explain how the 6-1 system was created to deprive blacks of voting strength to elect a candidate of their own choice for the newly created chair position in Orange County, Fla.

A DISCRIMINATORY DEVICE

Petitioners complained that the election system was nothing more than a spinoff of a coun-

ty charter device created in the 1980's by an identifiable all-white group of present and past former county commissioners, county attorneys, and a county administrator. Such a home rule charter seemingly was fair on its face, just as a literacy requirement or a poll tax might be. But the charter was intended to avoid a state-imposed county commission election system which would assure a meaningful voting opportunity for blacks. Whites who long controlled politics in Orange County sought a system to preserve their rule.

Public documents and news accounts dating from the '70's showed that the white county leadership was united in resistance to a Florida mandate for county commissioners to be elected from individual districts in which they resided, although those politicians differed on other issues.

With at-large election systems being challenged legally nationwide, some alternative was sought to avoid a system of pure single-mem-

ber district representation. Such single-member districting was referred to derisively as "ward politics," a term regarded by blacks as a code phrase or euphemism for meaningful black participation in the county political processes.

By 1984, Florida, led by the first black elected to the state legislature from Orange County in modern times, did favor such single-member districting for elections for county commissions, although an alternative with a sixth and seventh seat filled at large would be permitted. The latter 5-2 system at least avoided a singular seat, a chair, controlled at large by white voters, to dominate a county's legislative body. Either of the alternatives assured that a controlling chair would be elected among the commissioners themselves rather than by a white voting bloc.

HOW THE 6-1 SYSTEM CAME TO BE

By 1985, the all-white Orange County commission proposed avoiding the state-mandated

commission election system alternatives by securing home rule through enactment of a charter. They appointed an all-white nine-member commission headed by Tom Wilkes, now county attorney, to study the feasibility of charter government. He and/or the law firm with which he has been affiliated have served as attorneys for the county almost continuously since the 1970's.

In 1985, the primary drawback to charter government was the fact that the Orange County voters overwhelmingly defeated such proposals in separate referenda in the '60's and '70's, before "ward politics" became a factor. Some incentive was needed to prompt charter acceptance.

Again news reports and public documents offer insight as to how support for a charter was engendered among whites by the all-white committee created by the all-white commission. Appeals from local state legislators and from Orlando's mayor to diversify the committee at

least for credibility were ignored. So were black electors who were opposed to consideration of a charter, before voters were asked to replace an at-large election system with single-member districting for selection of county commissioners.

At public hearings in 1985-86, blacks, including Petitioners, asked that single-member districts be given priority, before consideration was given to charter government. They assured the white commission that a visit to the county's primary black quarter in Orlando would reflect how strongly blacks felt about single-member districting. The commission was unable or unwilling to meet in the black area.

Black leaders still came forward at downtown Orlando hearings to insist that county voters be given a choice about single-member district elections, as the state had mandated, before the charter escape route was used. Again, news reports and what became county legislative

history for charter government revealed that blacks perceived the "ward politics" code phrase as a signal to the white community to support a charter government to avoid black empowerment.

In 1986, the all-white committee headed by Wilkes and the all-white county commission placed a charter referendum on the ballot; the single-member districting issue was put on hold until the charter was resolved. The charter passed, with little more than a framework for the study of a future county commission election system. Public documents and news reports suggest that no other meaningful sign of governance was included in the Orange County's first charter.

Having a charter in place, the all-white county commission then created a 15-member Charter Review Commission (CRC) to study alternative forms of governance and election systems to be submitted to the voters in 1988. Whites did appoint two blacks among the 15 to study the issue. But the chair was the former

county administrator, the vice chair a former commissioner who long opposed "ward politics." And though Wilkes was not the CRC attorney, he did serve on the CRC and provided legal advice in support of a governing body whose chair would be elected at large. That legal advice also became part of a public record submitted by Petitioners when they filed suit.

By July 13, 1988, the CRC voted to submit a pure single-member district plan for elections to the county's governing body. An Orlando Sentinel editorial and the white mayor of Orlando cried out publicly against that plan. Those events were ignored by the judge designated for trial when he later resolved the case on defendants' motion for summary judgment. But he did put store in the action two days later by the CRC.

On July 15, 1988, the CRC reversed itself and placed two alternatives on the ballot--a proposition that five commissioners be elected

from single member districts, and another proposition for the 6-1 system to which Petitioners objected, because it did not resemble any election and/or governance system Florida required for its counties--including those under home rule.

In September, 1988, Orange County voters preferred both proposals on the ballot, to maintenance of the system of five commissioners elected at large. Had both propositios been defeated, the at-large commission system would have remained in place with a high degree of vulnerability to legal challenge. Indeed, in 1992, the judge designated for trial in this case stated that he would not have granted summary judgment were that full at-large commission election system in place. The Eleventh Circuit in otherwise affirming his decision disavowed his dicta.

In 1988, the pure single-member district plan was preferred by more Orange County voters, that the 6-1 system. But a white county attorney

advised before the election that if both were supported, the 6-1 system would become operative.

TOTALITY OF CIRCUMSTANCES

In 1990, this 6-1 election system was being used for the first time, after 40 years of county rule by a commission of five members, each of whom had been elected at large. But before 1950, when only whites had a meaningful vote in Orange County, "ward politics" did not prevent use of a pure single-member district plan, as noted in an affidavit from the Hon. Bob Webster submitted for Petitioners here in support of preliminary relief.

Judge Webster swore the changeover was made when Orange County, Fla., became the last of the 67 counties in the state to allow African-Americans to vote in what previously had been all-white partisan party primaries. By the time of the general election, it was a foregone conclusion that the Democratic party winner would prevail regardless of who voted. So a single-member dis-

trict election system was acceptable when "ward politics" were limited to whites.

But regardless what system had been in place for 120 years in Orange County, no black was known to have sought a county commission seat until 1990. To give blacks a meaningful opportunity for candidates of their choice, if not their race, the individual Petitioners had formed an Orange County Political Coalition a decade earlier.

The Coalition lobbied wherever possible in Orange County for offices to be filled by individuals selected from their own residential districts, rather than from at-large countywide races. Blacks, including the late Cornell Williams, a plaintiff below, often were quoted as calling for support of single-member election districts as the only incentive to encourage African-Americans to participate in the election process from which they had been excluded for decades.

In Orange County, there is minimal personal

contact between the black and white citizenry. De facto residential segregation remains prevalent in the county, so that, say, in its metropolitan center, Orlando, more than 95% of the more than 40,000 blacks in that city may be found living in the Southwest quarter of the municipality.

Almost all of the residents of one 100+-year-old community, Eatonville, are black. Several small towns in the county, like Ocoee, with a documented history of violent racism, Bithlo, and Windemere, are virtually all white.

POVERTY AMIDST PLENTY

The More populous cities of Apopka and Winter Park have identifiable black sections, sometimes, clearly located "on the 'wrong' side of the (railroad) tracks." And if there were any doubt that blacks fared far worse than whites economically, in Central Florida, in Orange County, in terms of income, wealth, and availability of resources, it was dispelled in 1988-89.

The City of Orlando in 1987 commissioned a study from the University of Central Florida, to ascertain why there was "poverty amidst plenty" in a more prosperous time, and what might be done to alleviate it. The Labor Study, of Poverty Amidst Plenty, revealed that the poor were disproportionately black and female in the Orlando Metropolitan Statistical Area, encompassing Orange County and two adjacent counties. The disparity was statistically significant, greater locally than nationally between blacks and whites, or even between African-Americans and Hispanics with whom they were compared separately. Except as evidence for proffered for trial here, the Labor Study findings and recomendations atrophied. The report was shelved by Orlando and ignored by Orange County.

From the outset in this legal action, as acknowledged in the August 31, 1990, opinion denial of preliminary relief, Petitioners offered Poverty Amidst Plenty and other non-legal materials

to demonstrate both the effects and likely motivation of the white county commissioners in the 1970's and 1980's to dilute minority voting strength in favor of their own constituencies in the white neighborhoods where they resided.

The present and former white county commissioners and paid officials had secured an election system that preserved what came to be known in the black community as one of "Snow White and the Six Dwarfs" after a woman became the first chair elected at large under the 6-1 system. Previously, the chair was chosen by the commissioners themselves, as one among equals.

That "6-1" chairperson spent 5-6 times as much as most of the individuals campaigning for the district seats, and received a salary more than three times greater than that of her colleagues. She now has executive powers such as personnel hiring and firing which previously had been exercised by appointed white county administrators.

Such facts continued to be added to the court file in this case in public documents and news reports.

But seventeen months later, after February 3, 1992, from the opinion granting summary judgment on a claim of intentional discrimination, Petitioners learned that such history, and proffered explanation for the cause and effects of the challenged 6-1 system in context, were considered irrelevant by the judge assigned for trial.

> Because the 6-1 proposal originated with the CRC and passed directly to the ballot without the approval of the BOCC (Board of Orange County Commissioners), evidence unrelated to this process is irrelevant to the claim of intentional discrimination.
> Williams v. Orange County, Fla., 783 F. Supp. 1348, 1357 (M.D. Fla. 1992, Hon. James L. Watson sitting by designation).

KEEPING THE CASE UNDER WRAPS

Unpleasant news about racial or economic disparity understandably was not, is not welcomed

in Orange County. The county once primarily was noted for its fruit; but since 1971, it has become a land of economic opportunity in the shadow of Disney World. For better or worse, the County is on public display for millions of tourists annually.

So on July 23, 1990, when Petitioners filed this action, they expected to be kept from public view as much as possible, not for legal reasons but for practical ones. Adverse publicity about racism in Disney World country hardly is good for tourism.

But no Petitioner could visualize that presiding jurists might abuse judicial discretion, and misuse federal rules of civil procedure, and judiciary and judicial practice, to render each of them to be the equivalent of Ralph Ellison's classic description of the Negro as Invisible Man.

From the time the verified complaint was filed until Petitioners found themselves on the street again without a day in court 18 months later, those blacks and their legal counsel were

given less than an hour of oral argument and no visible evidentiary opportunity to state their case.

Each side was given a half-hour to argue a motion about preliminary relief filed with the complaint 40 days earlier. Petitioners sought in their hearing opportunity on Friday, August 31st, to enjoin the first 6-1 county commission election in Orange County, scheduled for the next working day, after a Labor Day weekend.

In addition to legislative history obtained from the County's own files about the creation of the charter, and the 6-1 system, Petitioners presented affidavits, including one from an expert, Dr. Mark Stern. His data tended to show white and black racial bloc voting in national elections.

The data also was offered to show that the County knew or should have known in 1988 that no district with a majority of blacks could be created with the data it used, in a 6-1 system, though its white leadership publicly professed they wanted

to create such a district. Blacks including at least one who served on the CRC had stated in 1988 that seven to nine single-member districts would have to be created, if one were to contain a population in which blacks were in the majority.

In denying preliminary relief, Judge Patricia Fawsett, then presiding, ignored entirely Petitioners' claim that the data they were offering in pertinent part was to show the 6-1 system should be enjoined on constitutional aswell as on statutory bases, because it was created intentionally to maximize white election power and to minimize or dilute that of blacks. Petitioners had reason to believe that her "blind spot" to discriminatory intent may have been caused by her own personal prejudices against their views.

THE APPEARANCE OF JUSTICE....

Petitioners then were working under an umbrella organization of local African-American groups, the Committee of Organized Groups ("COG").

In October, 1988, on a COG motion, Judge Fawsett had recused herself in a currently stalled civil rights action. In that related case, it is alleged that the Orlando, Fla., 6-1 governing body has been racially resegregating the city by placement of various public projects without adequate black participation in the decision-making processes since the 1980's, COG v. City of Orlando, *88-962-Civ-Orl-18 (10)(M.D. Fla. 1988).

After Judge Fawsett and the Hon. G. Kendall Sharp recused themselves in the COG action, the case was transferred to a judge 75 miles away. He soon denied an Orlando motion to dismiss claims arising under 42 U.S.C. §§ 1981, 1982, and 1983, against the municipality. More than four years later, that case is awaiting resolution of class certification and trial before the fifth judge assigned to that action.

Believing the context to be similar for the COG action and this one below, COG, as a plaintiff

in this case, sought by motion and affidavit with the complaint to have Judges Sharp and Fawsett recuse themselves again. Judge Sharp immediately did so, and on July 23, 1990, the day the actio was filed, he granted a COG motion to disqualify himself--and Judge Fawsett.

But without explanation at any time, Judge Fawsett refused: to recuse herself; to reconsider her refusal; or to have the case reassigned, on separate motions filed for Petitioners before the preliminary hearing was held. So Judge Fawsett continued to preside throughout the pre-trial period.

After denying preliminary relief, she held only one hearing, on her own initiative, after attorneys for the named parties agreed to have a plaintiff class certified. Each side was given about 10 minutes each to describe the class in December, 1990. That was the last chance counsel were afforded to be heard by any jurist, about discovery and all other matters during the following year.

All attempts by Petitioners' counsel to be heard, in person, e.g., at a mandatory discovery conference, were denied without explanation, all motions on Petitioners' behalf ignored. For instance, Petitioners sought to disqualify Tom Wilkes, as county attorney because of his active role for defendants since the 1970's as a party to the CRC and as chair of the earlier commission.

When Petitioners' counsel discovered Wilkes' extensive historic role though a deposition taken of a former county administrator, they had sought to depose him as discovery time was running out. Wilkes proved unwilling to be deposed. So his removal as counsel was demanded, since he was anticipated to be a key witness at trial.

By Dec. 3, 1991, trial seemed inevitable, since counsel for both sides submitted a joint pre-trial stipulation required by local rules. Though defendants on Nov. 15, 1991, had filed a motion for summary judgment, both sides set forth

in the stipulation material facts they jointly believed were to be litigated. (See excerpt from Pre-Trial Stipulation in the appendix, and the requirements of the local rule presented supra). Though the judge designated for trial relied on that Stipulation in his published opinion, he made no mention of the material facts acknowledged to be in dispute between the parties. Other issues of mixed law and fact separately were in dispute.

On Nov. 15, 1991, counsel had been informed that the Hon. James L. Watson had been designated for trial. They would be attending a pre-trial conference on December 10, with him. However, though counsel for both sides agreed that a 2-3 week trial was necessary, Judge Watson was scheduled to be in Florida for less than a month.

Was Judge Watson assigned specifically to this case for that trial? Hardly. The Notice of Pre-Trial Conference listed this voting rights action as the 11th of 15 scheduled for pre-trial.

The other shoe dropped two days later. On Dec. 5, 1991, Judge Fawsett took under advisement defendants' summary judgment motion, though she left any delays they sought for pre-trial or trial purposes to Judge Watson. It was left unclear who would resolve the summary judgment motion. On that same Dec. 5th, Petitioners' counsel filed a motion and supporting papers pursuant to Rule 56 (e) and (f), of the Federal Rules of Civil Procedure.

The Rule 56(e) motion was based on an apparent misunderstanding by Petitioners' counsel that whatever affidavits defendants submitted on their supposed lack of intentional discrimination could not offset the inferences from the numerous public documents and their own legislative histories that there were material facts in dispute

on that claim. That contention of Petitioners' counsel was never addressed thereafter.

On December 10, 1992, Judge 'Watson met with counsel and said he would return on Jan. 2, 1992, with directions after he reviewed the case.

On Jan. 2, 1992, it appeared that the case file and Judge Watson had missed one another in transit. In chambers, Judge Watson said he would have the issue of summary judgment and the Rule 56(e)/(f) papers resolved by Jan. 12, 1992, and he would let counsel know about trial then. Nothing further in fact happened until Jan. 28th, when Judge Watson denied Petitioners' motion filed weeks earlier to have a judge review the magistrate's unexplained denial of a discovery conference mandated by Rule 26(f), Federal Rules of Civil Procedure. Summary judgment followed.

On Feb. 3, 1992, Before Judge Watson returned to New York, he left the written judgment and GRANT of summary judgment for Defendants

and DENIAL of the Rule 56(f) motion and all other pending motions for circulation. Petitioners timely filed scores of additional documents, affidavit and deposition excerpts to show that there were material facts in dispute.

They sought to have summary judgment altered or amended, especially with regard to the constitutional claim based on intentional discrimination. In those papers, Petitioners also pleaded with Judge Watson to protect the absent members of certified class, if he sustained summary judgment on the basis of the materials before him. For instance, what would happen if later evidence was uncovered to show conclusively that there had been or there is significant white racial bloc voting in Orange County? All blacks would be forever barred from making another § 2 claim against the 6-1 election system.

WHITE-ONLY CANDIDATE ELECTION DATA

Key to Judge Watson's granting of summary

judgment on the statutory claim were affidavits from one Defendant expert about white racial bloc voting. That expert relied on data from county commission races from 1980 through 1990, when no black ran for at-large office, and on exogenous county judge and school board elections in that period. The expert also considered the role of an Hispanic, Hernandez, in a 1982 School Board Democratic primary, (Williams v. Orange County, 783 F. Supp., at 1365) but he refused to do so when an Hispanic, Rodriguez, sought a commission seat. Rodriguez sought the minority seat created by political parties in the 6-1 county system, though no district then existed with a black majority.

After summary judgment, defendants timely opposed Petitioners' motion to alter or amend it. On Feb. 26, 1992 Judge Watson denied that motion.

On Dec. 28, 1992, the Eleventh Circuit, after oral argument, affirmed summary judgment with a per curiam opinion, Williams v. Orange County, 979 F.2d 1504 (11th Cir. 1992). That panel did disavow the following paragraph from Judge Watson:

> Nevertheless, the Court concludes that if this case were a challenge to the five at-large commissioner system that the 6-1 system replaced, the affidavit of Dr. Maggiotto (the aforementioned defendants' expert on white racial bloc voting) would be insufficent to meet movant's burden on motion for summary judgment. However, the 6-1 system was developed with the participation of the black community and was proposed in part in an attempt to facilitate minority participation in county government. Williams v. Orange County, 783 F. Supp., supra, at 1362.

After seeking and receiving an extension of time to file this petition, a certified class of African-American voters timely asks this Court to find that there are sufficient inferences of material facts in dispute on claims of constitutional and statutory violations of black voting rights in Orange County to warrant a trial or evidentiary hearing on the merits, before their right to be heard in open court about the 6-1 county commission election system, is lost forever.

REASONS FOR GRANTING THE WRIT

I. ELEVENTH CIRCUIT AFFIRMANCE OF SUMMARY JUDGMENT FOR DEFENDANTS ON A CONSTITUTIONALLY-BASED CLAIM OF VOTING RIGHTS DISCRIMINATION CONFLICTS WITH THE ONLY OTHER PUBLISHED CIRCUIT COURT DECISION ON THE ISSUE.

The Ninth Circuit summarily rejected a county's motion for summary judgment on a claim of constitutional violation of minority voter rights, Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990). The Garza court distinguished cases arising solely from alleged § 2 violations,

id., at 771. As discussed, infra, summary judgment even on statutory voting rights claims appears to be disfavored, except when it is clear, for instance, that plaintiffs simply cannot show under any circumstances that a district with a minority population in the majority could be created as an appropriate remedy for a challenged election system, i.e. one in which a minority would have a choice in selection of its representative(s), McNeil v. Springfield Park District, 851 F.2d 937, 940 (7th Cir. 1988), cert. den. 490 U.S. 1031 (1989).

A constitutional challenge not dismissed as frivolous or insubstantial calls into question not only the totality of circumstances but genuine issues of material facts in dispute about the subjective intent of defendants and their representatives in the creation and/or maintenance of an election system. This Court only recently acknowledged that it has not resolved how the Fifteenth Amendment to the U.S. Constitution may be appli-

cable in voting rights cases, Voinovich v. Quilter, 113 S.Ct. 1149, 1157 (1993). As for Fourteenth Amendment application, widespread reliance nationwide on a "results" test, in statutory voting rights challenges after §2 of the Voting Rights Act was amended in 1982, permitted parties and courts for the most part to avoid constitutional analyses and examination of intent behind creation or maintenance of particular local election systems, since Mobile v. Bolden, 446 U.S. 55 (1980).

In this case, the peculiar history involving identifiable whites who maneuvered for years to assure no more than token participation by blacks warranted the constitutional challenge to a 6-1 system which might appear to be fair on its face. County motivation was called into question by evidence of deliberate historic exclusion of black participation in the Orange County Commission processes. That evidence was offered in the form of public documents not readily susceptible to

summary resolution without evidentiary rulings, cf. Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988), and of news reports, McMillan v. Escambia County, Fla., 638 F. 2d 1239, 1248 (5th Cir. 1981). "(T)hough not legislative history, editorials written contemporaneously with the action are probative evidence of the motivation of the action" in a voting rights action, id..

As the Ninth Circuit correctly held, summary judgment is not appropriate to dispense with legitimate constitutional challenges in which alleged discriminatory intent by defendants in the creation and maintenance of an election system is called into question. That intent would be established here conclusively only by the testimony of the white elected county commissioners and white appointed officials who proposed and lobbied first for a charter and then a districting system to avoid governance by a legislative body elected entirely from single-member districts.

II. IN GRANTING SUMMARY JUDGMENT ON A CLAIM OF VOTING RIGHTS ACT VIOLATION, THE LOWER COURTS HERE ACKNOWLEDGED CONFLICT WITH THE FIFTH CIRCUIT IN THEIR RELIANCE ON DEFENDANTS' STATISTICAL DATA TO SHOW APPARENT ABSENCE OF WHITE RACIAL BLOC VOTING IN ORANGE COUNTY.

Lower courts, parties, and counsel agree that Thornburg v. Gingles, 478 U.S. 30 (1986), continues to be the starting point in any assessment of whether a violation of § 2 of the Voting Rights Act has resulted from creation of, or change in, a state or local election system. This Court in recent weeks has clarified the need for complainants challenging a system to bear the burden of proof to establish a violation, and to meet three preconditions before they can seek a remedy for alleged dilution of minority voting strength. See Voinovich v. Quilter, supra; Growe v. Emison, 113 S. Ct. 1075 (1993).

Those prerequisites are as applicable to challenges to single-member district or mixed at-large/single-member district election plans as they are to at-large election proposals, Growe v. Emison, 113 U.S., supra, at 1084. In particular here, Petitioners would be required to prove--not assume--racial bloc voting, at least to provide anecdotal evidence before they could proceed, id., at 1085. But this Court also has stated that such a factor cannot be considered mechanically, but must be viewed "under the totality of the circumstances," Voinovich v. Quilter, 113 S. Ct., supra, at 1157. Documents and anecdotal evidence apparently can be used when applicable to suggest that parties can meet the Gingles prerequisites and should have an opportunity to seek relief from a statutory violation, id., at 1158; Growe v. Emison, 113 S. Ct., supra, at 1085.

Here, the lower court relied on data submitted in affidavit form from defendants' expert

to determine that whites have not voted as a bloc to defeat black choices for the county commission, or to block black candidates in school board and county judge elections, 1980-90. Since plaintiffs had not proved otherwise by affidavits, the judge designated for trial granted summary judgment to defendants on the statutory claim.

That judge, however, said he would not have done so if the same data would have been offered when all the commissioners were elected at large, that is until 1990, but he was relying on the affidavit, because defendants had shown blacks participated in approval and implementation of the 6-1 system, Williams v. Orange County, 483 F. Supp., supra, at 1362. The Eleventh Circuit specifically disavowed that reasoning by the judge, Williams v. Orange County, 979 F.2d 1504, supra.

So in the Eleventh Circuit, it would appear that data from elections in which no minority candidate ever has sought the office can be used to

assess the "choices" of the affected minority. It would appear from the data published with the lower court opinion, such black "choices" can be discerned even when it is not reported how many black electors participated in each of the elections. The expert provided no breakout by race in the total vote. It thus is unclear whether the percentages he found are based on, say, 10, or 100, or 1,000 blacks who participated in exercising their choice for a particular white candidate.

The judge designated for trial specifically reported that his acceptance of such data was contrary to the decision from the Fifth Circuit in Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987). See Williams v. Orange County, 483 F. Supp., supra, at 1361.

The Eleventh Circuit accepted that assessment, in which the trial judge quoted from the Fifth Circuit decision: "'[I]mplicit in the Gingles holding is the notion that black preference is det-"

"ermined from elections which offer the choice of a black candidate. The various Gingles concurring and dissenting opinions do not consider evidence of elections in which only whites were candidates. Hence neither do we.' Gretna, 834 F. 2d at 503-4," Williams v. Orange County, supra, at 1361.

Further, none of the various Gingles opinions regarded the methodology used by the defendants' expert here as the sole or even preferable means to establish racial bloc voting or its absence. Here, such methodology was accepted, not to counter Petitioners' proofs below, but to bar blacks from even proving bloc voting by whites in other ways, say, by consideration of voting patterns in 1984 and 1988 presidential primaries in which Jesse Jackson appealed to large numbers of blacks and far fewer whites. Nothing in this Court's opinions in Gingles or later suggests that an affidavit from a voting rights expert in support

of a motion for summary judgment can defeat any opportunity a complaining party should have to meet its burden of proof on the prerequisite of racial bloc voting. This Court should now resolve the conflict of what proofs and when they must be submitted by plaintiffs who seek to satisfy the threshhold requirement of white racial bloc voting before they can proceed to demand a § 2 remedy.

III. IN AN ERA OF BURGEONING CRIMINAL CASE-LOADS, LOWER COURTS FIND THEMSELVES IN CONFLICT ABOUT THEIR LATITUDE TO INTERPRET STATUTES AND RULES OF JUDICIAL PROCEDURE AND PRACTICE TO DISPENSE WITH DISFAVORED CIVIL CASES, SUCH AS THIS CERTIFIED CLASS ACTION.

Chief Justice William H. Rehnquist last year was quoted as saying that a litigation explosion has made the federal courts a scarce resource. He opined that access to the courts one day may have to be regulated "on the basis of the greatest good for the greatest number," "Complex Suits," The National Law Journal, May 15, 1992.

The chief justice last month, however, signaled that the day is not yet at hand. For the Court, he opined in a reversal of a dismissal of a § 1983 complaint that judges below would have to change rules of civil procedure rather than deviate from them to rid themselves of cases with litle perceived merit, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993).

The burden was considered to be so great in the U.S. District Court for the Middle District of Florida, where this case arose, that the active judges announced they would suspend their hearing of civil trials on Feb. 1, 1991, as "the only option remaining which might permit continued control of a burgeoning case load," "Middle District of Florida Suspends Civil Trials," The Third Branch, February, 1991, p. 9.

So the assignment of a visiting judge for the anticipated trial in this case was in keeping with

the self-imposed limitations by Judge Fawsett and the other active judges in the District., and with due process of law. However, other shortcuts taken in this voting rights action to expedite the matter away from court without any evidentiary opportunity were not in keeping with the application of federal standards for judicial practice and procedure in civil cases in other federal circuits.

The Fifth Circuit would have rejected both (1) the refusal of the judge designated for trial here to grant Petitioners' Rule 56(f) motion for continuance to complete taking and submission of discovery, upon receipt of counsel's non-evidentiary affidavit, and (2) the lower court jurists' denial without explanation of a motion for Rule 26(f) discovery conference. See Union City Barge Line, Inc., 823 F.2d 129, 136 (5th Cir. 1987), for the former holding, page 136; for the latter, page 133, and n. 11, for other citations to enforcement of such conferences in the Third, Seventh,

and Eighth Circuits. Neither magistrate nor judge here suggested that the discovery conference was not being held, because the rule's requisites had not been met, or because the discovery problem was insignificant. They stated no reason at all.

Petitioners' counsel first sought the conference, then the delay, when it became apparent that he was being denied access to key witnesses and information. By the time the Rule 56(f) motion was submitted, even the trial judge was prepared to concede that the expert and his data had been revealed at the 11th hour when Petitioners' counsel could have no timely access to him, Williams v. Orange City, 783 F. Supp., supra, 1352.

Petitioners not only were denied fair access to the court to control the discovery process, but they were denied opportunity for any meaningful pre-trial conference in chambers or court, since counsel never saw the designated trial judge after he reviewed the papers and, most significantly,

they were never given a chance to present evidence, proof by testimony, etc., either for preliminary relief, on the motion for summary judgment, or at any other relevant time. After the preliminary relief oral argument was held 40 days after the motion, Petitioners' counsel were not given any time to explain their positions in person.

The Eleventh Circuit has taken the position that entry into the courthouse and the right to file papers are enough to satisfy any constitutional right of access to the federal judicial system, Copeland v. Green, 949 F.2d 390 (11th Cir. 1991). A similarly limited view was offered in Brown v. Grabowski, 922 F.2d 1097 (3rd Cir. 1989).

However, the Second Circuit has decided that access is based on a fundamental constitutional right, Morello v. James, 810 F.2d 344 (2d Cir. 1987), at least when a constitutional question is at issue, as it is here, Gronne v. Abrams, 793 F.2d 74, 78 (2d Cir. 1986). The D.C. Circuit has said

that access is a constitutional right that may not be impaired, Urban v. United Nations, 768 F.2d 1497 (D.C. Cir 1985).

The applicability of the Due Process Clause to the issue is acknowledged in the First Circuit, Simons v. Dilhart, 804 F.2d 182 (1st Cir. 1987); Germany v. Vance, 868 F.2d 9, 15 (1st Cir. 1989). The Eighth Circuit has called for free and unhampered access, Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir. 1986).

The concept of such access has been applied most frequently in the Fifth Circuit, see, e.g., Crowder v. Sinyard, 884 F.2d 804, 811 (5th Cir. 1989). In the seminal case of Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983), the Fifth Circuit found that access to courts, to sue and defend, rested on constitutional footing in Chambers v. B&O Railroad, 207 U.S. 104 (1907). The Ryland decision also stated that meaningful access was said to have been embedded in the right of pe-

tition in the First Amendment, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), but it is unclear if that refers to access to courts generally, that is, to state forums only.

Even if this Court decides that the named Petitioners have not been denied meaningful access in this case, certainly it cannot deny the absent certified class of tens of thousands of black citizens has been given no opportunity to be heard. Their counsel timely called for his own removal or class decertification, if necessary, so absentees would not be prejudiced. His plea went unheard.

An ongoing duty to make sure that a certified class is protected was stated in Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986). Absentee members in particular must be protected, if a certified class is perceived as not being adequately represented, Guerine v. J & W Investment, Inc., 544 F.2d 863 (5th Cir. 1977). An appeals court has an obligation to protect the absentee

members if they were to lose all rights because of resolution of the merits in a dispute in which they have, or might have, a stake, Andrews v. Bechtel Power Corp., 780 F.2d 124 (1st Cir. 1985).

The Eleventh Circuit not only failed to find such a duty here, but it did not even bother to follow the rule of its predecessor on which it often has relied to review demands for judicial disqualification of a trial judge if they were timely made before the conclusion of the case, In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980, en banc). They were here.

Petitioners made clear from the outset through appeal that Judge Fawsett should not be allowed to sit, certainly without explanation, after COG filed an affidavit, pursuant to 28 U.S.C. §144, and explained why she should step aside, 28 U.S.C. §455a, especially after Judge Sharp granted the motion to disqualify both of them.

By its silence, the Eleventh Circuit apparently

adheres to its criticized practice of applying a "harmless error" interpretation to refusals for recusal, even when disqualifications are warranted, Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988), cert. den. 109 S.Ct. 2066 (1989).

Other federal circuits seek to apply the judicial disqualification statutes strictly, In re Faulkner, 856 F.2d 716, 720 (5th Cir. 1988); Barksdale v. Emerick, 853 F.2d 1359, 1362 (6th Cir. 1988), and the D.C. Circuit would provide retroactive relief, if necessary, Jenkins v. Sterlacci, 856 F.2d 274 (D.C. Cir. 1988).

If no petition were to issue, if this voting rights action is not remanded for evidentiary proceedings on the merits, certainly any of the tens of thousands of absentee class members, black voters who did not participate here, would appear to be fully justified in believing that expediency has replaced the appearance of justice in the federal courts most directly affecting them.

CONCLUSION

For the above reasons, certiorari should be granted to review the published judgment and affirmance, with exception, by the Eleventh Circuit of the published district court order of summary judgment in favor of defendants on constitutional and statutory claims raised by a certified class of black voters. The decision(s) below should be reversed and the matter remanded, so that evidentiary proceedings may be held at the trial level on the issues raised in this controversy.

Respectfully submitted,

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